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No. 16-9493

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

FLORENCIO ROSALES-MIRELES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals permissibly exercised its discretion to deny relief on plain-error review of the calculation of petitioner's advisory Sentencing Guidelines range.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 850 F.3d 246.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2017. The petition for a writ of certiorari was filed on June 5, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of

illegally reentering the United States after having been removed following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). He was sentenced to 78 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-5.

1. In June 2015, agents with the United States Department of Homeland Security received information that petitioner, a citizen of Mexico, had been arrested for assaulting a family member and jailed in Travis County, Texas. Presentence Investigation Report (PSR) ¶ 4. A records check revealed that petitioner had previously been removed from the United States to Mexico following a conviction for aggravated assault. Id. ¶¶ 5-6. Petitioner admitted that he had reentered the United States illegally by wading across the Rio Grande River. Id. ¶ 7.

2. A federal grand jury returned an indictment charging petitioner with illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(2). Pet. App. 2; Indictment 1. Petitioner pleaded guilty to that offense without a plea agreement. Pet. App. 2; PSR ¶ 2.

The Probation Office determined that petitioner's total offense level under the Sentencing Guidelines was 21 and that his criminal-history category was VI, resulting in an advisory Guidelines range of 77 to 96 months of imprisonment. PSR ¶¶ 21, 33, 60. Petitioner did not object to the Probation Office's

recommended Guidelines calculations, although he requested a downward departure to 41 months. Pet. App. 3.

The district court denied the departure and sentenced petitioner to 78 months of imprisonment. Pet. App. 3. In rejecting petitioner's request for a downward departure, the court stated that it "would have not sentenced [petitioner] to anything less than the 78 months after * * * his conduct in these cases and his conduct here today." 2/16/16 Sent Tr. (Sent. Tr.) 9. The court further justified its sentence by recounting petitioner's prior illegal entry, his use of multiple aliases and other false identification information, and his repeated "assaultive behavior" stretching back to 2001. Id. at 9-10.

3. The court of appeals affirmed. Pet. App. 1-5.

Petitioner argued for the first time on appeal that the district court erred in calculating his criminal-history category. See Pet. C.A. Br. 8-12. Specifically, petitioner contended that the district court erroneously counted the same conviction twice and assigned him four criminal-history points for that conviction, rather than the two points that it merited. Id. at 9-10.

The court of appeals reviewed petitioner's forfeited claim under the plain-error standard. Pet. App. 3. It concluded that petitioner had satisfied the first three prongs of that standard, namely, that he "show (1) an error; (2) that was clear or obvious; and (3) that affected his substantial rights." Ibid. The court

held (and the government conceded) that the district court erred in double-counting a single conviction and that the error was "clear from the language of the Guidelines." Ibid. (citation omitted). The court further observed that, absent the error, petitioner's advisory sentencing range would have been 70 to 87 months of imprisonment, rather than 77 to 96 months. Ibid. Because the error affected the Guidelines calculation and the court could not say that the district court "explicitly and unequivocally" indicated that it would have imposed the same sentence under the correct Guidelines range, the court of appeals concluded that the error affected petitioner's substantial rights. Ibid. (citation omitted).

The court of appeals, however, "elect[ed] not to exercise [its] discretion" to correct the Guidelines error. Pet. App. 4. It explained that such an exercise of discretion would be appropriate only if petitioner established the fourth prong of plain-error review, which requires a showing that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Ibid. (quoting United States v. Escalante-Reyes, 689 F.3d 415, 419 (5th Cir. 2012) (en banc)). The court noted that "[t]he fourth prong is not satisfied simply because the 'plainly' erroneous sentencing guideline range yields a longer sentence than the range that, on appeal, we perceive as correct." Ibid. (citation omitted). "Rather, '[t]he types of

errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" Ibid. (quoting United States v. Segura, 747 F.3d 323, 331 (5th Cir. 2014)).

The court of appeals concluded that this case did not present such an error. In particular, there was "no discrepancy between the sentence and the correctly calculated range," and the district court had sentenced petitioner within the middle of the correct range. Pet. App. 4 (emphasis in original).

ARGUMENT

Petitioner contends (Pet. 6-12) that the court of appeals' decision misapplies the plain-error standard and conflicts with decisions of other courts of appeals. Those contentions lack merit. The court's decision is correct. And petitioner significantly overstates the extent of the disagreement among the circuits over whether a Guidelines error usually satisfies the fourth prong of the plain-error standard, which is largely attributable to differences in how those courts exercise their discretion rather than a dispute over the legal standards governing plain-error review. In any event, even if a circuit conflict existed on that issue, this case would be a poor vehicle for resolving it. The petition for a writ of certiorari should be denied.

1. When a defendant fails to object to an alleged error in the district court, he may not obtain relief from that error on appeal unless he establishes reversible "plain error" under Federal Rule of Criminal Procedure 52(b). See Puckett v. United States, 556 U.S. 129, 134-135 (2009). Reversal for plain error "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Young, 470 U.S. 1, 15 (1985) (citation and internal quotation marks omitted). To establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" Johnson v. United States, 520 U.S. 461, 467 (1997) (brackets in original) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)). If those prerequisites are satisfied, the court of appeals has discretion to correct the error based on its assessment of whether "(4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Ibid. (internal quotation marks omitted; brackets in original) (quoting Young, 470 U.S. at 15). "Meeting all four prongs is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

This Court has consistently held that a "per se approach to plain-error review is flawed" and that "[t]he fourth prong" of the plain-error standard "is meant to be applied on a case-specific

and fact-intensive basis." Puckett, 556 U.S. at 142 (citation, emphasis, and internal quotation marks omitted). As a consequence, "a plain error affecting substantial rights does not, without more, satisfy" the fourth prong of plain-error review, "for otherwise the discretion afforded by Rule 52(b) would be illusory." Olano, 507 U.S. at 737. This Court has thus rebuffed efforts to eliminate the fourth prong or to collapse it into one of the other three. See, e.g., Puckett, 556 U.S. at 142-143 (rejecting contention "that the fourth prong of plain-error review * * * has no application" to claims involving breaches of plea agreements because "there may well be countervailing factors in particular cases" even if the other three prongs are satisfied). And the Court has relied upon the fourth prong to affirm convictions despite obvious error. See United States v. Cotton, 535 U.S. 625, 632-633 (2002) (concluding that failure to allege drug quantity in indictment did not merit reversal under fourth prong where evidence of drug quantity was "overwhelming") (citation omitted); Johnson, 520 U.S. at 469-470 (same for error in jury instructions).

If there were any doubt as to courts of appeals' discretion under the fourth plain-error prong in Guidelines cases, this Court's recent decision in Molina-Martinez v. United States, 136 S. Ct. 1338 (2016), dispelled that doubt. The Court in Molina-Martinez held that, in light of the Guidelines' importance to federal sentencing, a district court's error in applying an

incorrect Guidelines range "itself can, and most often will, be sufficient to show a reasonable probability of a different outcome" under the third plain-error prong. Id. at 1345. But the Court did not hold that such an error, without more, automatically satisfies the fourth prong as well. To the contrary, the Court made clear that, "[u]nder the Olano framework, appellate courts retain broad discretion in determining whether a remand for resentencing is necessary" in the particular circumstances of a case. Id. at 1348.

2. a. The court of appeals did not abuse its discretion in concluding that petitioner failed to show that the district court's Guidelines error seriously affected the fairness, integrity, or public reputation of the proceedings. The court of appeals properly conducted a "case-specific and fact-intensive" inquiry, Puckett, 556 U.S. at 142, and based its discretionary determination on the fact that there was "no discrepancy" between petitioner's sentence and the correctly calculated Guidelines range and that petitioner's sentence fell within the middle of that range, Pet. App. 4 (emphasis in original). On those facts, the court of appeals correctly concluded that the district court's mistake did not represent the sort of serious error that requires reversal under the fourth plain-error prong. Ibid.

b. Petitioner's contrary arguments lack merit. Petitioner contends (Pet. 6-9) that the court of appeals' description of the

fourth prong incorrectly imposes a "reformulated and heightened standard" that departs from this Court's decision in Olano. In Olano, this Court repeatedly emphasized that a court of appeals retains discretion to determine whether it is necessary to correct an unpreserved "error [that] is 'plain' and 'affect[s] substantial rights.'" 507 U.S. at 735 (brackets in original). The Court made clear that, while a court of appeals has the authority to order correction of such an error, it "is not required to do so." Ibid. (emphasis added). The Court further explained that the court of appeals may exercise that discretion when it finds not only that the plain error affected the petitioner's substantial rights, but also that it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Id. at 736 (emphasis added; brackets in original); see also Puckett, 556 U.S. at 135.

The court of appeals in this case twice recited that "seriously affects" formulation of the fourth plain-error prong from Puckett and Olano. Pet. App. 3, 4. It further elaborated by stating that errors warrant reversal when they "would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." Id. at 4 (citation omitted). The court did not appear to view the two formulations as requiring a different result on the facts of this case. See ibid. Petitioner does not explain how the court's analysis would

have turned out differently if the court had omitted its gloss on the Puckett and Olano standard. Nor does petitioner suggest any kind of error that would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," as Olano requires, 506 U.S. at 736, but would not also "serve as a powerful indictment against our system of justice," Pet. App. 4.

Petitioner contends that Olano "rejected suggestions in earlier cases that Rule 52(b) should be employed only in circumstances where 'a miscarriage of justice would otherwise result.'" Pet. 8 (quoting Olano, 507 U.S. at 736-737). That contention is misplaced. The Court in Olano stated that it had previously "explained that the discretion conferred by Rule 52(b) should be employed in those circumstances in which a miscarriage of justice would otherwise result." 507 U.S. at 736 (citation and internal quotation marks omitted). The Court did not disavow that explanation, but it cautioned that the term "miscarriage of justice" should not be given the same meaning it has in the collateral-review context, where it "means that the defendant is actually innocent." Ibid. The Court observed that in the plain-error context, it had "never held that a Rule 52(b) remedy is only warranted in cases of actual innocence." Ibid. The court of appeals did not impose any such limitation here.

Petitioner further contends (Pet. 8) that the court of appeals adopted "a 'shock the conscience' standard [that] would elevate

plain error review to the level of substantive due process." That contention misreads the court's decision. The court stated that it exercises discretion to correct plain errors that, "if left uncorrected, would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." Pet. App. 4 (emphasis added; citation omitted). In other words, the court indicated that an uncorrected error that "shock[s] the conscience" is a sufficient, but not necessary, condition for the discretionary correction of a plain error. Ibid. Consistent with that understanding, the Fifth Circuit has -- as petitioner acknowledges (Pet. 10-11) -- regularly exercised its discretion to grant resentencing in other plain-error cases, without requiring that the uncorrected error "shock the conscience." See, e.g., United States v. Dias, No. 16-40862, 2017 WL 1048069, at *2 (Mar. 17, 2017) (per curiam); United States v. Rojas-Ibarra, 669 Fed. Appx. 269, 270 (2016) (per curiam); United States v. Miller, 657 Fed. Appx. 265, 270-271 (2016) (per curiam); United States v. Santacruz-Hernandez, 648 Fed. Appx. 456, 458 (2016) (per curiam); United States v. Martinez-Rodriguez, 821 F.3d 659, 666-667 (2016); United States v. Alegria-Alvarez, 471 Fed. Appx. 271, 275-276 (2012) (per curiam); United States v. Andino-Ortega, 608 F.3d 305, 311-312 (2010).

c. Petitioner also argues (Pet. 8) that the court of appeals' application of the fourth prong of plain-error review conflicts with this Court's decision in Henderson v. United States, 133 S. Ct. 1121 (2013). That argument lacks merit. In Henderson, this Court addressed the second prong of plain-error review, holding that, regardless of "whether a legal question was settled or unsettled at the time of trial, 'it is enough that an error be "plain" at the time of appellate consideration' for '[t]he second part of the * * * Olano test [to be] satisfied.'" Id. at 1130-1131 (brackets in original) (quoting Johnson, 520 U.S. at 468). In so doing, it rejected an approach that would involve "a grading system for trial judges." Id. at 1129. But it did so in part because of the separate backstop provided by the fourth prong, which "restricts the appellate court's authority to correct an error to those errors that would, in fact, seriously affect the fairness, integrity, or public reputation of judicial proceedings." Ibid. Henderson's holding about the second prong is therefore unavailing to petitioner.

In any event, the court of appeals' decision here did not turn on whether the error called into question the competence or integrity of the district judge. Rather, the court focused on the lack of any disparity between petitioner's sentence and the correct advisory Guidelines range. Pet. App. 4.

3. Petitioner contends (Pet. 9-10) that the Fifth Circuit's "heightened standard" conflicts with other circuits' application of the fourth prong of the plain-error standard to Guidelines errors. This Court recently denied certiorari in Patino-Almendariz v. United States, 137 S. Ct. 2118 (2017), which raised a similar claim of circuit conflict, and the same result is warranted here.

a. The circuits have generally followed this Court's directive to conduct "a case-specific and fact-intensive" inquiry. Puckett, 556 U.S. at 142. Some circuits, however, have taken an approach to Guidelines errors that is arguably in tension with that directive. As petitioner notes (Pet. 9), the Tenth Circuit has adopted a presumption that relief should be granted under the fourth plain-error prong where a clear Guidelines error affects the defendant's substantial rights under the third prong. See United States v. Sabillon-Umana, 772 F.3d 1328, 1333 (2014). Two other courts of appeals have stated that they "ordinarily" will grant relief in such cases, United States v. Figueroa-Ocasio, 805 F.3d 360, 374 (1st Cir. 2015); see United States v. Joseph, 716 F.3d 1273, 1281 (9th Cir. 2013).

Petitioner also cites (Pet. 9) decisions from the Third and Seventh Circuits, but both circuits apply a more nuanced approach than petitioner suggests. In United States v. Dahl, 833 F.3d 345, 359 (2016), the Third Circuit noted that it "generally" exercises

discretion to grant relief in cases involving plain Guidelines errors. But the Third Circuit has also cautioned that its "broad discretion" under the fourth plain-error prong "should not be exercised reflexively" in Guidelines cases. United States v. Calabretta, 831 F.3d 128, 140 (2016), abrogated on other grounds by Beckles v. United States, 137 S. Ct. 886 (2017). Similarly, the Seventh Circuit indicated in United States v. Garrett, 528 F.3d 525, 530 (2008), that it ordinarily remands in cases in which an error "led to a higher Guideline range." In other cases, however, the Seventh Circuit has not applied such a categorical rule. See United States v. Doss, 741 F.3d 763, 768 (2013) (considering whether Guidelines error "impacted the fairness of the proceedings" in deciding whether "to exercise our discretion to correct the error") (citation omitted); cf. United States v. Burns, 843 F.3d 679, 689 (7th Cir. 2016) (concluding that a Guidelines error "that significantly increases a defendant's prison sentence without a proper factual basis" is an appropriate scenario in which to exercise discretion under the fourth prong).

Any disparity in the courts of appeals' application of the fourth plain-error prong in Guidelines cases is largely attributable to differences in how those courts choose to exercise their discretion, rather than disagreements over the legal standards for plain error. All circuits, including those that have adopted a general presumption of resentencing for Guidelines

errors, agree that the fourth prong requires the exercise of judicial discretion. See, e.g., Figueroa-Ocasio, 805 F.3d at 367; Joseph, 716 F.3d at 1277, 1281; United States v. Meacham, 567 F.3d 1184, 1190 (10th Cir. 2009). The existence of variations in appellate courts' exercise of that discretion, including different approaches to the question of how often resentencing should be granted to correct an unpreserved claim of Guidelines error, does not warrant this Court's review. Cf. Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993) (noting that courts of appeals may "vary considerably" in their exercise of supervisory authority).

b. Petitioner also argues (Pet. 10-11) that the decision below "contributes to a growing intracircuit conflict" in the Fifth Circuit about the fourth plain-error prong. But the Court does not ordinarily grant certiorari to resolve intracircuit conflicts. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). Doing so would be unwarranted here. The omission of the elaboration on the Olano standard at issue here from a number of recent Fifth Circuit decisions suggests either that the court of appeals does not believe that the elaboration creates a distinct substantive standard, or that the issue has not been fully settled in that court.

4. Even if the question presented merited review, this case would be an unsuitable vehicle because petitioner is unlikely to

benefit from a decision in his favor. First, there is no discrepancy between petitioner's sentence of 78 months and the proper advisory Guidelines range of 70-87 months; the imposed sentence falls squarely in the middle of the correct range. Even in cases in which the court of appeals has omitted the particular fourth-prong formulation used here, it has declined to correct errors "[w]here the difference between the imposed sentence and the properly calculated range is small." Pet. App. 4 (citing United States v. Emanuel-Fuentes, 639 Fed. Appx. 974, 977 (5th Cir. 2015) (per curiam); United States v. Avalos-Martinez, 700 F.3d 148, 154 (5th Cir. 2012), cert. denied, 133 S. Ct. 1276 (2013)).

Second, if the case were ultimately remanded to the district court for resentencing, petitioner would likely receive the same sentence. The district court stated that it "would have not sentenced [petitioner] to anything less than the 78 months after * * * his conduct in these cases and his conduct here today." Sent. Tr. 9. After reviewing petitioner's criminal history, the court further observed that it had imposed an "adequate" and "just punishment for his offense." Id. at 10. In addition, the court selected a sentence above the minimum end of the incorrect Guidelines range and denied petitioner's motion for a downward departure, confirming that it viewed petitioner's 78-month sentence as appropriate in this case. Although the court of

appeals did not believe that, for purposes of the third plain-error prong, the district court's statements at sentencing "explicitly and unequivocally" demonstrated that the district court would have imposed the same sentence under a revised Guidelines range, Pet. App. 3 (citation omitted), those statements suggest that the district court would reach the same result if resentencing were ordered.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2017

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** via email and first-class mail, postage prepaid, this 9th day of August 2017.

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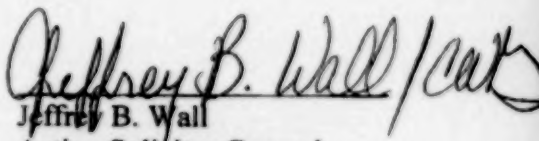

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August 9, 2017

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Case Management Supervisor, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

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